No. 86-609

Supreme Court, U.S.
FILED
NOV 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 238,

Petitioner,

v.

CRST, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. KONCHAR
KEVIN J. VISSER
MOYER & BERGMAN
2720 First Avenue NE
Cedar Rapids, IA 52406
Telephone: (319) 366-7331

MELVIN R. MANNING
MANNING, DAVIS & KIRBY
700 East Main Street
Richmond, VA 23219

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

WHETHER THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE GRIEVANCE PROCEDURE OF A COLLECTIVE BARGAINING CONTRACT CANNOT BE RESURRECTED, AFTER IMPASSE, TO APPLY TO A DISCHARGE OCCURRING OVER ONE YEAR AFTER THE CONTRACT'S EXPIRATION.

PARTIES INVOLVED PURSUANT TO SUPREME COURT RULE 28.1

CRST, Inc.
CRST International, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

REASONS FOR DENYING THE WRIT:

I. THE EIGHTH CIRCUIT PROPERLY HELD THAT THE GRIEVANCE MACHINERY OF AN EXPIRED COLLECTIVE BARGAINING AGREEMENT COULD NOT BE RESURRECTED, AFTER BARGAINING IMPASSE, TO PROVIDE ARBITRATION FOR A COMPLAINT FOUNDED ON A DISCHARGE WHICH OCCURRED OVER ONE YEAR AFTER THE CONTRACT'S EXPIRATION 1

II. BOTH PARTIES EXPRESSLY REJECTED THE EXPIRED CONTRACT'S GRIEVANCE PROCEDURES; ABSENT AGREEMENT TO ARBITRATE, NO SUCH DUTY EXISTS 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES:

Nolde Bros. v. Local 358, 430 U.S. 243 (1977) ..... *Passim*

A.T. Massey Coal Company, Inc., et al. v. International Union, United Mine Workers of America, 799 F.2d 142 (4th Cir. 1986) 4

Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST, 795 F.2d 1400 (8th Cir. 1986) 2, 3, 4, 6

Diamond Glass Corporation v. Glass Warehouse Workers and Paint Handlers Local Union 206, 682 F.2d 301 (2nd Cir. 1982) 5

Garland Coal and Mining Company v. United Mine Workers, 778 F.2d 1297 (8th Cir. 1985) 5

Local 703, International Brotherhood of Teamsters v. Kennicott, 771 F.2d 300 (7th Cir. 1985) 2, 5

O'Connor Company v. Carpenters Local Union No. 1408, 702 F.2d 824 (9th Cir. 1983) 5

REASON FOR DENYING THE PETITION

THE EIGHTH CIRCUIT'S EN BANC DECISION IS CONSISTENT WITH THE OPINIONS OF ALL OTHER CIRCUIT COURTS OF APPEALS WHICH HAVE CORRECTLY APPLIED THIS COURT'S DECISION IN *NOLDE BROS. V. LOCAL 358.*

———o———

ARGUMENT

I. The Eighth Circuit properly held that the grievance machinery of an expired collective bargaining agreement could not be resurrected, after bargaining impasse, to provide arbitration for a complaint founded on a discharge which occurred over one year after the contract's expiration.

A.

The Eighth Circuit's limitation of post-termination arbitration to claims asserted within a reasonable time after contract expiration is consistent with *Nolde Bros. v. Local 358,* 430 U.S. 243 (1977) and the law of other circuits.

This Court in *Nolde Bros.* found no need to "speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." *Nolde Bros. v. Local 358,* 430 U.S. at 255, note 8. The Eighth Circuit properly observed that to expand the *Nolde Bros.* holding beyond its stated limits:

> 'would mean that parties to a collective bargaining agreement would be presumed to intend that any dis-

> pute arising between them years or even decades after the expiration of the agreement would be arbitable.' *Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST*, 795 F.2d 1400, 1404 (1986) (App. D to Petition for Writ, page A-29), quoting from *Local 703 International Brotherhood of Teamsters v. Kennicott*, 771 F.2d 300, 303 (7th Cir. 1985).

The opinion of the Eighth Circuit is consistent with the recognized limits of *Nolde Bros.* from the standpoint of the need to assert a claim for arbitration within a "reasonable time" after the contract's expiration. Thirteen months after a collective bargaining contract has expired is not a reasonable time. In *Local 703, International Brotherhood of Teamsters v. Kennicott*, 771 F.2d 300 (7th Cir. 1985), the Seventh Circuit refused to allow the arbitration provisions of an expired collective bargaining agreement to govern a discharge occurring some six months after expiration. There, the court stated:

> Although it may be reasonable to presume that parties intend to arbitrate grievances arising shortly after the expiration of a contract, the presumption weakens as the time between expiration and grievance events increases. A contrary holding would mean that parties to a collective bargaining agreement would be presumed to intend that any dispute arising between them years or even decades after the expiration of the agreement would be arbitrable. We do not read the Nolde presumption of arbitrability to persist indefinitely after expiration. 771 F.2d 300, 303.

The lapse of time in the present case was even more pronounced as Ottaway's discharge for reckless driving occurred more than one year after the old collective bargaining agreement expired.

Any presumption in favor of arbitration must be tempered by the equally well recognized rule that only a party that contracts to arbitrate grievances is so bound. *Nolde Bros.*, 430 U.S. at 250-51. The parties here contracted to arbitrate disputes for a certain, set period of time. More than one year after the contract had been cancelled, and with no new agreement in place, the union sought arbitration over its member's reckless driving discharge. The event triggering this charge took place wholly after the date of contract expiration and cancellation. To hold that an arbitration procedure that was rejected by both the union and CRST in subsequent negotiations must remain in place is to render nugatory the agreement of the parties to allow their contract to expire on a date certain.

B.

The right to grieve discharges or any other matters is solely the creature of collective bargaining agreements. See, *Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST*, 795 F.2d at 1404. No "right arising *under* the contract" is here the subject of the attempted grievance.

In *Nolde Bros. v. Local 358*, 430 U.S. 243 (1977), certain severance rights had accrued under the earlier collective bargaining agreements. There, this Court affirmed the opinion of the Fourth Circuit that the severance pay claims which were asserted three days after the contract's cancellation were subject to arbitration. The *Nolde Bros.* decision was limited to the arbitration of such grievances as arise under the operation of an expired collective bargaining agreement. The severance pay in *Nolde Bros.*

was viewed by the Courts as deferred compensation, a sum to be vested in the employee by virtue of the continuing accrual throughout the duration of employment. *Nolde Bros. v. Local 358*, 430 U.S. at 248, n. 4.

Here, the union seems to argue that Ottaway is perpetually entitled to a "just cause" standard with respect to employment decisions despite the cancellation of the collective bargaining contract. There being no collective bargaining agreement in place between the parties, the claim to a collectively bargained standard of incompetency in the making of employment decisions is unavailable to the union.[1]

The employment relationship itself is not a right or relationship arising under a collective bargaining agreement, but rather exists independently of the collective bargaining process.

The *Nolde Bros.* theory that severance pay is akin to deferred compensation is inappropriate when applied to the right disputed here. "The disputed right here, the right to be discharged for just cause, is dissimilar to the rights found arbitrable above such as severance pay and vacation pay, because it cannot be worked towards or accumulated over time." *Chauffeurs, Teamsters, & Helpers Local 238 v. CRST*, 795 F.2d 1400, 1404, (8th Cir. 1986).[2]

---

1 In fact, the lack of an agreement between the parties (as evidenced by the acknowledged "impasse") raises grave doubts as to whether jurisdiction for a § 301 suit exists. See, *A.T. Massey Coal Company, Inc., et al. v. International Union, United Mine Workers of America*, 799 F.2d 142 (4th Cir. 1986).

2 It is important to note that on rehearing en banc, not even a majority of the original Eighth Circuit panel supports the extreme position that the right to a "just cause" dismissal is a right arising under the old collective bargaining agreement. See, *Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST*, 795 F.2d 1400, 1410 (Partial Dissent of Judge Wollman).

The decisions of the federal Circuit Courts of Appeals have been consistent in interpreting the limited post-termination arbitration rights as set forth by this Court in *Nolde Bros.* See, *Garland Coal and Mining Company v. United Mine Workers*, 778 F.2d 1297 (8th Cir. 1985); *Local 703, International Brotherhood of Teamsters v. Kennicott*, 771 F.2d 300 (7th Cir. 1985); *O'Connor Company v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983); *Diamond Glass Corporation v. Glass Warehouse Workers and Paint Handlers Local Union 206*, 682 F.2d 301 (2nd Cir. 1982).

II. Both parties expressly rejected the expired contract's grievance procedures; absent agreement to arbitrate, no such duty exists.

The union supplementally argues that CRST has somehow created an obligation to arbitrate post-expiration discharges by means of the implementation of unilateral terms and conditions of employment, after collective bargaining had reached impasse. (Petition for Writ, p. 6.) One fatal flaw in this argument is that the union, in its Complaint and throughout the District Court proceedings, sought to have the *old contract's* grievance procedure resurrected even though the agreement had been cancelled. Now, on Petition for Grant of Writ of Certiorari, the union for the first time seems to contend that CRST is contractually bound by some different discharge grievance procedure, instituted after impasse. The union's contention, raised here for the first time, is untimely. Order of Dist. Ct., p. A-1 (Appendix to Petition for Writ).

The union cannot seek arbitration pursuant to the old contract language because neither CRST nor the union

sought to continue with the expired grievance machinery after impasse. See, *Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST*, 795 F.2d 1400, 1402. In fact, during negotiations for a new contract, both CRST and the union proposed grievance machinery different from the old contract language. It would be unfair to both the union and CRST to impose upon them the obligation to arbitrate disputes where (1) both expressly rejected the old grievance language by seeking different language in their negotiations for a new contract and (2) CRST's unilateral proposal not only excluded all matters except seniority from arbitration, but also had its contract offer expressly rejected by the union, thereby establishing the exact opposite of a "contract," an impasse.

SUMMARY

This Court, in *Nolde Bros.*, recognized that some limits must be placed upon the continued arbitrability of post-termination grievances. The en banc opinion in the instant case merely brings into line the law of the Eighth Circuit with the consistent interpretation of *Nolde Bros.* as expressed by the opinions of all other Federal Circuit Courts of Appeals which have addressed the issue. No dispute or conflict as to the limitations exists and accordingly the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

MOYER & BERGMAN

By /s/ ROBERT E. KONCHAR

By /s/ KEVIN J. VISSER
2720 First Avenue NE
P.O.Box 1943
Cedar Rapids, IA 52406

MANNING, DAVIS & KIRBY

By /s/ MELVIN R. MANNING
700 East Main Street
Richmond, VA 23219

Attorneys for Respondent